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SUPREME COURT, U.S.

NO. 81-5082

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1981

FRANK PERKINS,

Petitioner,

-vs-

ROBERT R. RAINES,

Respondent,

ON WRIT OF CERTIORARI TO THE NINTH CIRCUIT COURT OF APPEALS

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Did the circuit court abuse its discretion in denying petitioner's application for a certificate of probable cause?

2. Does this court have jurisdiction to grant petitioner's petition for writ of certiorari?

STATEMENT OF THE CASE

Petitioner was charged by indictment in Cause No. A-31397 in Pima County Superior Court, State of Arizona, with five counts of unlawful sale of narcotics, and with two counts of unlawful transportation of narcotics. Following a jury trial, petitioner was found guilty of all charges. On April 13, 1977, the trial court suspended imposition of sentence, and placed petitioner on probation for a period of 7 years.

Petitioner was arrested on August 4, 1978, and was charged with burglary and grand theft. On August 15, 1978, petitioner's probation officer filed a petition to revoke probation, alleging that petitioner had violated the conditions of his probation by: (1) being arrested for burglary and grand theft, (2) associating with Ronald Barrows, (3) failing to inform the probation officer that he had changed his address, and (4) failing to report to the probation officer each month.

At his initial appearance on August 21, 1978, petitioner entered a denial of the allegations of the petition to revoke probation. At the evidentiary hearing, however, petitioner admitted allegations numbers 2, 3, and 4 of the petition. In exchange for petitioner's admissions, the state agreed to dismiss the burglary and grand theft charges pending against petitioner. The trial court accepted petitioner's admissions and ordered that his probation be revoked.

On October 13, 1978, the trial court sentenced petitioner to 15 to 20 years on each of the five counts of unlawful sale of narcotics, sentences to run concurrently. The court also sentenced petitioner to 15 to 20 years on each of the two counts of unlawful transportation,

sentences to run concurrently with each other, but consecutive to the sentences imposed for unlawful sale.

Petitioner appealed from the revocation of his probation, and the sentences he received, to Division Two of the Arizona Court of Appeals. On appeal, he claimed that he was prejudiced by the delay in bringing him before a magistrate following his arrest, and that the sentences he received were excessive. The Court of Appeals, in a memorandum decision filed May 8, 1979, affirmed the revocation of petitioner's probation, and the sentences he had received. Petitioner filed a motion for rehearing, which was denied on June 6, 1979. He filed a petition for review in the Arizona Supreme Court, which was denied on July 11, 1979.

On January 9, 1980, petitioner filed a petition for post-conviction relief in the trial court alleging a violation of his Fourteenth Amendment rights. The trial court dismissed his petition on April 7, 1980, and petitioner did not seek review of that decision pursuant to Rule 32.9, Arizona Rules of Criminal Procedure.

On September 15, 1980, petitioner filed a petition for writ of habeas corpus in the Arizona Supreme Court. In his petition, petitioner claimed that the trial court had erred in sentencing him to 90 days at Arizona State Prison as a condition of his probation. The Arizona Supreme Court denied his petition for writ of habeas corpus on October 7, 1980.

On November 19, 1980, petitioner filed a petition for writ of habeas corpus in the United States District Court for the State of Arizona. The only issue he raised in his petition was a claim that he was being punished twice for the same offense. Respondent made a motion to dismiss the

petition on the ground that petitioner had failed to state a ground upon which relief could be granted. The district court dismissed petitioner's petition on January 12, 1981. Petitioner filed a motion for rehearing, which was denied by the district court on February 26, 1981. Petitioner filed a notice of appeal in the Court of Appeals for the Ninth Circuit. The district court refused to issue a certificate of probable cause on the ground that petitioner's appeal was frivolous. Petitioner then requested the Court of Appeals to issue a certificate of probable cause in order to allow him to appeal from the district court. On April 29, 1981, the Court of Appeals denied petitioner's application for a certificate of probable cause on the ground that it did not present a substantial question. Petitioner filed a petition for rehearing, and that petition was denied on May 20, 1981. On July 14, 1981, petitioner filed a petition for writ of certiorari in this Court.

ARGUMENTS

I

THE CIRCUIT COURT DID NOT ABUSE ITS DISCRETION IN DENYING PETITIONER'S APPLICATION FOR A CERTIFICATE OF PROBABLE CAUSE.

Petitioner claims that the Circuit Court erred in denying his application for a certificate of probable cause on the ground that it did not present a substantial question. Respondent submits that the Circuit Court properly denied petitioner's application because petitioner failed to raise a federal constitutional question in his petition for writ of habeas corpus in district court by his claim that he was subjected to double punishment under Arizona's narcotics laws. Matters of sentencing properly

belong within the province of the state criminal justice system, and state rules of sentencing ordinarily do not involve constitutional issues that can be reached by habeas corpus. Holmes v. Israel, 453 F.Supp. 864 (E.D.Wis. 1978). Where a sentence is within the limit set by law, its severity is not grounds for relief on habeas corpus. United States ex rel. Sluder v. Brantly, 454 F.2d 1266 (7th Cir. 1972). Petitioner failed to state a ground upon which habeas corpus relief could be granted.

Further, petitioner was not entitled to habeas relief on his claim of double punishment because his argument was devoid of merit. Petitioner argued that he was sentenced twice for his narcotics offenses. The record does not support petitioner's claim. Following his original convictions, petitioner was placed on probation. Pursuant to Ariz.Rev.Stat.Ann. § 36-1002.02(C), petitioner was committed to the Department of Corrections for a period of 60 days. The trial court had no discretion in the matter, as § 36-1002.02(C) requires a defendant convicted of a drug offense under § 36-1002, who receives probation, to be committed to the Department of Corrections for from 30 to 60 days as a condition of his probation.

The Arizona Supreme Court has approved the imposition of prison time as a condition of probation as authorized by § 36-1002.02. State v. Valenzuela, 116 Ariz. 61, 567 P.2d 1190 (1977). Petitioner argued, however, that he was "sentenced" to 60 days imprisonment, and that the sentence imposed on him following revocation of his probation was double punishment. The Arizona Supreme Court has held that incarceration as a part of probation is not a sentence to confinement, but is, instead, a condition of probation established at the time sentence is suspended. Pickett v.

Boykin, 118 Ariz. 261, 576 P.2d 120 (1978). Since petitioner did not receive two sentences, his double punishment argument was devoid of merit, and the Circuit Court properly denied his application for a certificate of probable cause.

II

THIS COURT DOES NOT HAVE JURISDICTION TO GRANT PETITIONER'S PETITION FOR WRIT OF CERTIORARI.

Petitioner claims that this Court has jurisdiction to grant a writ of certiorari in this matter. The considerations governing review on writ of certiorari are set forth in Rule 17, Supreme Court Rules. That rule provides in pertinent part as follows:

> 1. A review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefor. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered.
>
> (a) When a federal court of appeals has rendered a decision in conflict with the decision of another federal court of appeals on the same matter; or has decided a federal question in a way in conflict with a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.
>
> (b) When a state court of last resort has decided a federal question in a way in conflict with the decision of another state court of last resort or of a federal court of appeals.
>
> (c) When a state court or a federal court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way in conflict with applicable decisions of this Court.

It is apparent from the above-cited rule that this Court has wide discretion in deciding whether to grant a petition for writ of certiorari. However, the court's jurisdiction arises only in cases involving a federal constitutional question. Since the issue petitioner has raised is not a federal constitutional question, this Court does not have jurisdiction in the present matter.

CONCLUSION

Since petitioner failed to raise a substantial federal question in district court, the circuit court did not err in denying his application for a certificate of probable cause. Moreover, this Court does not have jurisdiction in this matter because of petitioner's failure to raise a federal question. For the preceding reason, respondent respectfully requests that this Court deny petitioner's petition for writ of certiorari.

Respectfully submitted,

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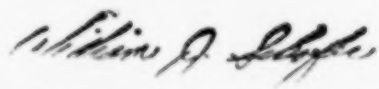

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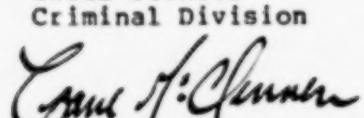

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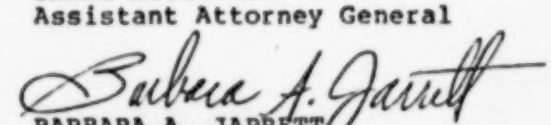

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